STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED August 26, 2003
v	No. 238746 Oakland Circuit Court
TORIA NADINE SHOWS, Defendant-Appellant/Cross-Appellee.	LC No. 00-176046-FH

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver fifty grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and felonious assault, MCL 750.82. Defendant was sentenced to a term of five to twenty years' imprisonment for the drug conviction with a consecutive term of two months to four years' imprisonment for the felonious assault conviction. Defendant appeals as of right and asserts that the evidence was insufficient for the drug possession conviction.[1] The prosecutor cross-appeals and argues that the trial court improperly deviated from the sentencing guidelines. We affirm defendant's convictions but vacate defendant's sentence on the cocaine possession with intent to distribute conviction, and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Defendant's Appeal

Defendant argues that the evidence was insufficient to support her drug possession conviction. We disagree.

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). A trier of fact

[1] Defendant does not challenge on appeal the sufficiency of the evidence with respect to the felonious assault conviction.

may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The elements of possession with intent to deliver cocaine are: (1) the defendant knowingly possessed the controlled substance; (2) the defendant intended to deliver the controlled substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between fifty and 225 grams. MCL 333.7401(2)(a)(iii); *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The defendant's knowledge of the quantity of the controlled substance alleged to have been possessed is not an element of the offense. *People v Marion*, 250 Mich App 446, 450-451; 647 NW2d 521 (2002).

Circumstantial evidence and reasonable inferences drawn from the evidence are sufficient to prove possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Minimal circumstantial evidence is sufficient to prove intent to deliver. Intent to deliver can be inferred from the quantity of the controlled substance in the defendant's possession and from the way in which the substance is packaged. *Id*. at 517-518.

Defendant argues on appeal that the evidence did not establish the fourth element of the crime, that the cocaine was in a mixture weighing fifty to 224 grams of cocaine. The evidence presented to the jury established that defendant voluntarily made a statement to the police in which she admitted to purchasing an amount of cocaine for about $12,000 with the intent to sell it for a profit. She took the cocaine to the house of her cousin, Marcus Eccles, where the cocaine was divided into four bags. In her statement to the police, defendant admitted that one of the bags was hidden between two boards. The evidence established that the police recovered a bag of cocaine from a bedroom closet between two boards. The parties stipulated that the bag of cocaine weighed 153 grams. Viewed in a light most favorable to the prosecution, the jury could have reasonably concluded that the bag of cocaine the police retrieved between the boards was the same bag of cocaine that defendant described in her statement to the police. Accordingly, the jury could reasonably find that the amount of cocaine that was in defendant's possession was within the weight range of MCL 333.7401(2)(a)(iii). Therefore, the evidence was sufficient for defendant's conviction.

II. The Prosecutor's Cross-Appeal

The prosecutor argues on cross-appeal that the trial court abused its discretion in deviating from the minimum sentencing guidelines for the cocaine possession conviction. We agree and remand for resentencing for the cocaine possession conviction.

The trial court may depart from the minimum term of imprisonment if it finds on the record that substantial and compelling reasons exist to do so. MCL 333.7401(4). At the time of defendant's arrest, trial and sentencing, MCL 333.7401(2)(a)(iii) provided a mandatory ten-year

minimum term and a maximum term of twenty years' imprisonment.[2] However, the trial court departed from the minimum sentence for the cocaine possession conviction and sentenced defendant to a minimum term of five to twenty years' imprisonment.

This Court reviews for clear error the trial court's determination of the existence of a sentencing factor. *People v Babcock (Babcock III)*, ____ Mich ___; ___ NW2d ___ (Docket No. 121310, filed 7/31/03), slip op p 28, quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). We review de novo the determination that the sentencing factor is objective and verifiable. *Babcock III, supra*. We review for an abuse of discretion the determination that the objective and verifiable factor constitutes a substantial and compelling reason to depart from a mandated minimum sentence. *Id.* at slip op pp 28-29. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at slip op p 29.

To constitute a substantial and compelling reason for departing from a mandated sentence, a reason must be objective and verifiable, and must irresistibly hold the attention of the court. *Babcock III, supra* at slip op pp 8-9, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). A substantial and compelling reason "exists only in exceptional cases." *Babcock III, supra* at slip op p 9, quoting *Fields, supra* at 62.

The trial court identified four factors upon which it grounded its decision to deviate from the sentencing guidelines for the drug possession conviction: (1) defendant was seventeen years old at the time of the incident, (2) defendant was pursuing her education as exemplified by the fact that she completed high school and was accepted into a trade school, (3) defendant demonstrated "good potential" for rehabilitation, exemplified in her active work with church and youth groups and family support, and (4) she demonstrated good behavior while on bond.

We are satisfied that the first three factors articulated by the trial court are objective and verifiable. *People v Daniel*, 462 Mich 1, 7, 18; 609 NW2d 557 (2000); *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996). However, based on the record before us, these factors do not present, singularly or collectively, substantial and compelling reasons for the downward departure.

As to the fourth factor, the record is unclear whether defendant's behavior on bond warranted consideration for a downward departure. Defendant was found at her cousin Marcus Eccles' house during a separate drug raid of the premises while she was on bond and the quality of her post-arrest cooperation was disputed. The trial court did not state why this factor constituted a substantial and compelling reason to depart from the minimum sentence. Accordingly, we vacate defendant's sentence on the possession with intent to deliver fifty grams or more but less than 225 grams of cocaine conviction and remand for resentencing.

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[2] While defendant's appeal was pending in this Court, 2002 PA 665, effective December 26, 2002, amended MCL 333.7401, one of the statutes under which defendant was convicted and sentenced. As a result of the amendment, MCL 333.7401(2)(a)(iii), no longer requires a minimum sentence of ten years or less. As a general rule, the proper sentence is that which was in effect at the time the offense was committed. See *People v Schultz*, 435 Mich 517, 530; 460 NW2d 505 (1990).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens